BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA J. MESZAROS	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,035,908
	)	& 1,035,909
DIAMOND COACH CORPORATION	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

The employer, Diamond Coach Corporation, and its insurance carrier appealed the February 20, 2009, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

On August 6, 2007, claimant filed two applications for hearing. In the first, claimant alleged a May 5, 2006, accident from the repetitive use of her right upper extremity and alleged injuries to her right hand and elbow. That claim was assigned Docket No. 1,035,908. The other application alleged an October 11, 2006, accident and repetitive trauma injuries to her left upper extremity. That claim was assigned Docket No. 1,035,909.

At the February 4, 2009, Preliminary Hearing before Judge Klein, claimant requested medical treatment for the carpal tunnel syndrome that had been diagnosed in her left upper extremity. In the February 20, 2009, Order, Judge Klein held that Dr. Paul W. Toma was authorized to treat claimant's left carpal tunnel syndrome in Docket No. 1,035,908. In addition, the Judge ruled that claimant had failed to prove timely written claim in Docket No. 1,035,909. The February 20, 2009, Order reads:

> Dr. Toma is the Authorized Treating Physician for the Claimant's bi-lateral thumb injuries. During his treatment of those injuries, he diagnosed the Claimant with a carpal tunnel condition on October 20, 2008. From Claimant's testimony

> Dr. Toma was aware that Claimant had worked for the school district washing dishes and at Amazon since her employment with the Respondent. He attributed her condition to her prior work activities. Dr. Toma is authorized under case number 1,035,908 to treat the carpal tunnel syndrome. The Court finds that case number 1,035,909 is defective due to a written claim defense.[1]

Respondent contends Judge Klein erred. Respondent does not challenge that claimant injured her right thumb, left elbow, and left thumb while working for respondent as respondent voluntarily provided medical treatment, including surgery, for those injuries. But respondent denies any responsibility for the left carpal tunnel syndrome that has now been diagnosed. Respondent maintains that the claim for the left carpal tunnel syndrome is the subject of Docket No. 1,035,909, which respondent argues is not a compensable claim as claimant failed to prove timely written claim for the alleged October 11, 2006, accident. Respondent argues claimant did not send written claim to respondent for that accident until July 17, 2007.

What is more, respondent contends that under K.S.A. 44-508(d) the date of accident for the carpal tunnel syndrome claim is October 20, 2008, as that is the date Dr. Toma *formally* diagnosed carpal tunnel syndrome. And that date is approximately 18 months after claimant last worked for respondent and after claimant had started working for another employer.

Accordingly, respondent maintains it is not liable for claimant's carpal tunnel syndrome for three reasons; namely, claimant failed to provide timely written claim, she was not working for respondent on the date of accident, and that injury arose out of her subsequent employment. In short, respondent requests the Board to deny claimant's request for workers compensation benefits for her carpal tunnel syndrome.

Conversely, claimant requests the Board to affirm the February 20, 2009, Order. Claimant maintains her carpal tunnel syndrome was caused by the repetitive trauma she sustained through her last day of working for respondent, which she testified was November 10, 2006 (rather than October 11, 2006). She argues she had left carpal tunnel syndrome when respondent began providing her medical treatment for the left thumb injury but the doctor simply missed diagnosing it. In essence, claimant argues respondent's acceptance of the left thumb injury comprised an acceptance of the left carpal tunnel syndrome. In her brief to this Board, claimant wrote in part:

> The administrative law judge also did not err when finding that the claim for carpal tunnel injury was timely made. As stated previously, Claimant was experiencing problems with her left thumb that were very similar yet with differences

[1] ALJ Order (Feb. 20, 2009).

> to the right thumb. No additional testing was performed by the authorized treating physician initially. It appears that it was simply assumed that the injury was identical to the right thumb injury. Obviously, after the EMG, Dr. Toma found Claimant was actually suffering from carpal tunnel. It was simply a misdiagnosis on the left thumb. A claimant must provide notice of an accident, not a specific injury. (Citations omitted.) Respondent has already accepted as compensable the injuries to the thumbs.
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> It is clear that when all evidence and case law is reviewed, Claimant has suffered an injury out of and while in the course of her employment and that it was timely made. It is therefore compensable. The order of the Administrative Law Judge should be upheld.[2]

The issues raised on this appeal are:

1. Did claimant develop carpal tunnel syndrome in her left upper extremity from the work she performed for respondent through November 10, 2006?

2. If so, what is the date of accident for that repetitive trauma-type injury and did claimant provide respondent with timely written claim?

3. Did claimant's work activities after leaving respondent's employment terminate her right to receive workers compensation benefits from respondent for her left carpal tunnel syndrome?

4. Did the Judge award benefits in the wrong claim?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

Respondent manufactures buses or coaches for the handicapped. Claimant began working for respondent in April 2002. Her first job was to pull wire from spools, strip the wire, assemble and prepare it for installation, and then install the wire in the coach. After doing that job for a little over a year, claimant injured her right elbow.

After recuperating from right elbow surgery, claimant returned to work in a light duty position. After six weeks in that job, claimant returned to wiring. She then installed the wiring under the dash of the coach and, in addition, made the back wall. Claimant

[2] Claimant's Brief at 3, 4 (filed March 25, 2009).

performed that job approximately three years from 2003 to November 10, 2006, when claimant underwent right thumb surgery.[3]

Claimant did not return to work for respondent after her right thumb surgery. When she tried to resume her job in April 2007, respondent advised there was no work that she could perform. Despite having undergone right elbow surgery in 2003, left elbow surgery in June or July 2006, and right thumb surgery in November 2006, Dr. Paul W. Toma released claimant in April 2007 to work without restrictions.

Claimant remained unemployed until August 2007 when she began working part-time for the Oswego School District. Claimant's job is helping both serve food and cleaning the kitchen. Mostly, claimant works two hours a day but she sometimes works more hours when a co-worker either falls ill or takes the day off. Claimant acknowledged that she uses her hands in a repetitive manner working for the school district and that washing dishes and carrying pans aggravates and increases the symptoms in her hands.[4]

Claimant developed symptoms in her left thumb and hand before she left respondent's employment. But the doctor chose to concentrate treatment on the right thumb and hand as it was more symptomatic. Dr. Toma, the surgeon who operated on claimant's right thumb in November 2006, told claimant early on that her left thumb problems were similar to those of her right thumb and that she might require left thumb surgery if it gave her any more problems. But claimant's right thumb surgery involved moving a tendon from claimant's foot to her hand and she was reluctant to undergo that procedure on her left hand and foot.

The therapist who conducted a functional capacity evaluation in March 2007 noted that surgery was to be scheduled on claimant's left wrist because she was having the same problem in her left wrist that she had experienced in the right. Almost a year later, in late February 2008, claimant underwent left thumb surgery as her pain had increased and she was experiencing more problems grasping objects.

Claimant did not work anywhere between February 2008 and August 2008. Despite the fact she was not working, claimant continued to experience symptoms in her left hand. In short, the surgery did not resolve her left thumb pain, the numbness in her fingers, or the swelling in her left hand. In July 2008, during a post-surgery follow-up appointment with her doctor, Dr. Toma determined claimant needed an EMG to rule out left carpal tunnel syndrome.

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[3] P.H. Trans. at 14.

[4] *Id.*, at 24.

If the medical records presented at the preliminary hearing are complete, claimant next saw Dr. Toma on October 20, 2008. The office notes from that visit indicate the nerve studies were positive for left carpal tunnel syndrome, which the doctor indicated was probably related to her previous work activities. The doctor wrote, in part:

> At this time I've released her to full activities as far as her basal joint reconstruction. She does have carpal tunnel syndrome. I believe this, more likely than not, is probably related to previous work activities since it is a repetitive stress problem, which we believe also contributed to her basal joint injury as well as her extensor tendinitis.
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> Again, more likely than not, I believe this is work related and will require surgery at some time in the future. I will see the patient back in six weeks.[5]

Dr. Toma was apparently aware of claimant's job with the school district as his November 2007 office note makes a reference to claimant's working three to four hours per day in a kitchen. What is more, claimant testified she initially reported to Dr. Toma the numbness and tingling that she now attributes to her left carpal tunnel syndrome but she does not know why the doctor did not write that down.[6] Moreover, she testified when her "right hand started to go, well, I was still working at Diamond, I had to compensate a lot with my left hand."[7]

Claimant worked for an employment agency at Amazon.com from November 24, 2008, through late January 2009, when she was terminated. Claimant acknowledged the work she performed for Amazon.com increased and intensified the symptoms in her left hand and wrist.[8] Claimant described how the work at Amazon.com affected her symptoms:

> Oh, it would have pains that run down through my hands (indicating) into my wrists and up into my elbows and [I would] go home and eat half a dozen Ibuprofens just to kill it. And the numbness and tingling got to where you couldn't hold the boxes or you weren't sure you were holding on to anything, you know.
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> . . . .

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[5] *Id.*, Cl. Ex. 1.

[6] *Id.*, Resp. Ex. 2 (Meszaros Depo. at 34).

[7] *Id.*, Resp. Ex. 2 (Meszaros Depo. at 38).

[8] *Id.*, at 29.

> Until -- until I got in a good resting state by the morning, just the numbness and the tingling was there, but the pain was gone. Until you get started in your daily routines, whether you're washing dishes, you're feeding the animals, you're vacuuming, any kind of physical activity aggravates it.[9]

Nancy Newby, who is respondent's human resources director, testified she knew of claimant's bilateral thumb problems as claimant had been seeing a doctor for elbow problems and that doctor had diagnosed bilateral basal thumb arthritis. Ms. Newby authorized treatment for both thumbs as respondent accepted those problems as being related to claimant's work. Ms. Newby testified, in part:

> I want to make it clear, Patty was a good employee and when she decided that the physical [work] was too much, she wanted to find something less physical, we, the only concern we had at the time was Dr. Silverberg had already talked about the left thumb and we wanted to make sure that the Insurance Carrier had that on record that there would be no issue of being compensable if she terminated at that point and we called right then I believe and talked to Judy.[10]

Based upon claimant's testimony regarding the symptoms in her left hand, claimant probably had left carpal tunnel symptoms when she began treating with Dr. Toma for her bilateral thumb and wrist problems. At this juncture, Dr. Toma's opinion is uncontradicted that claimant's left carpal tunnel syndrome is related to her prior work activities with respondent. Accordingly, based upon Dr. Toma's office notes, the undersigned finds claimant developed the left carpal tunnel syndrome as a result of the work she performed for respondent. Moreover, claimant's testimony is that while working for respondent she began compensating for her right thumb symptoms by using her left hand more. Therefore, the evidence may eventually establish a relationship between claimant's upper extremity injuries.

In conclusion, the evidence establishes that claimant developed carpal tunnel syndrome in her left upper extremity from the work she performed for respondent through November 10, 2006, when she left work for her right thumb surgery.

CONCLUSIONS OF LAW

By definition, repetitive trauma injuries occur over a period of time. But the Workers Compensation Act is keyed, in essence, to a single date of accident. For example, to determine whether there is timely notice and timely written claim, the worker's average

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[9] *Id.*, Resp. Ex. 2 (Meszaros Depo. at 11).

[10] *Id.*, at 47.

weekly wage, and the maximum weekly compensation rate, a date certain must be selected for the accident date.

The Act provides several benchmarks for selecting a single date of accident for a repetitive trauma injury. K.S.A. 2007 Supp. 44-508(d) provides, in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. . . .

Here, Dr. Toma believed claimant's left hand and wrist injury was basal joint arthritis and left wrist strain. The undersigned finds that Dr. Toma initially failed to diagnose claimant's carpal tunnel syndrome and that such condition was part and parcel of claimant's left hand and wrist injury.

Claimant was never taken off work by the authorized physician for her left hand and wrist symptoms and never restricted from performing her work for respondent as she did not work for respondent following her November 10, 2006, right thumb surgery. At this juncture there is no evidence that claimant was given written confirmation that her left hand and wrist injuries were work-related. Consequently, according to this record the earliest benchmark listed in K.S.A. 2007 Supp. 44-508(d) that occurred was when claimant provided respondent with written notice of her injury. And this record establishes that date was August 6, 2007, when claimant filed an application for hearing with the Division of Workers Compensation alleging a repetitive use injury to her left upper extremity.

Accordingly, K.S.A. 2007 Supp. 44-508(d) establishes the date of accident for claimant's left upper extremity injury that she sustained while working for respondent, including both her carpal tunnel syndrome and basal joint, as August 6, 2007. Accordingly, the application for hearing claimant filed with the Division of Workers Compensation on that date comprises timely written claim.[11] It should be noted the date of accident under K.S.A. 2007 Supp. 44-508(d) may change as the record develops.

Respondent argues claimant should not receive workers compensation benefits for the left carpal tunnel syndrome as she has worked for two other employers since leaving

[11] See K.S.A. 44-520a.

respondent's employment and that subsequent employment has aggravated her symptoms. First, claimant's employment with Amazon.com did not commence until late November 2008, which was after Dr. Toma had sent claimant for nerve conduction studies in July 2008 to rule out carpal tunnel syndrome and after the doctor had opined in October 2008 that claimant would more likely than not require surgery.

Second, as indicated above, Dr. Toma was aware of claimant's part-time kitchen job. And despite that knowledge the doctor concluded claimant's left carpal tunnel syndrome was more likely than not related to her previous work activities with respondent. That opinion is uncontradicted. Consequently, at this juncture the record establishes that it is more probably true than not that claimant's carpal tunnel condition and her need for treatment is directly related to the work she performed for respondent.

In short, the work claimant performed for the school district and Amazon.com after leaving respondent's employment does not terminate claimant's right to receive workers compensation benefits from respondent for her left carpal tunnel syndrome.

Based upon the above, the undersigned reverses the Judge's determination that claimant's left carpal tunnel syndrome is part of Docket No. 1,035,908 as that claim is for repetitive trauma to the right upper extremity. More importantly, however, the undersigned reverses the Judge's findings pertaining to Docket No. 1,035,909 and finds that claimant is entitled to receive workers compensation benefits from respondent for the repetitive trauma she sustained to her left upper extremity, including the carpal tunnel syndrome.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms Judge Klein's finding that claimant is entitled to receive workers compensation benefits from respondent for the repetitive trauma injuries she sustained to her left upper extremity, including carpal tunnel syndrome, while working for respondent. The undersigned, however, reverses the February 20, 2009, Order regarding whether those benefits should be paid under Docket No. 1,035,908 or 1,035,909; consequently, claimant is entitled to receive workers compensation benefits from respondent in Docket No. 1,035,909.

IT IS SO ORDERED.

[12] K.S.A. 44-534a.

Dated this ____ day of May, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
Elizabeth Reid Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge